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Office of Administrative Law Judges
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Issue Date: 30 March 2006

In the Matter of:

ELMER LEE SHANNON,
Claimant

Case No. 2004-BLA-37

v.

DOMINION COAL CORPORATION,
Employer

and

SUN COAL COMPANY, INC.,
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

Appearances:

Elmer Lee Shannon
Pro Se Claimant

Joseph Bowman, Esq.
Street Law Firm LLP
Grundy, Virginia
For the Employer

Before: Alice M. Craft
Administrative Law Judge

DECISION AND ORDER DENYING REQUEST FOR MODIFICATION

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 et seq. The Act and implementing regulations, 20 CFR Parts 410, 718, 725 and 727, provide compensation and other benefits to living coal miners who are totally disabled due to pneumoconiosis and their dependents, and surviving dependents of coal miners whose death was due to pneumoconiosis. The Act and regulations define pneumoconiosis, commonly known

as black lung disease, as a chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. 30 U.S.C. § 902(b); 20 CFR § 718.201 (2005). In this case, the Claimant, Elmer Lee Shannon, alleges that he is totally disabled by pneumoconiosis.

There was no hearing on this case, as all parties agreed to have the case decided on the record. In an order dated September 27, 2004, I admitted Director's Exhibits ("DX") 1-131, Claimant's Exhibits ("CX") 1, and Employer's Exhibits ("EX") 1-2 into evidence and set a schedule to complete the record. The parties were allowed 30 days to submit closing arguments, which were optional. None were submitted.

In reaching my decision, I have reviewed and considered the entire record pertaining to the claim.

PROCEDURAL HISTORY

The Claimant filed his initial claim on November 13, 1984. DX 1. Administrative Law Judge Kichuk held a hearing on May 10, 1988 and on December 27, 1988 issued a Decision and Order Awarding benefits to Mr. Shannon. The Employer appealed the award, and on June 7, 1991, the Benefits Review Board, (the "Board") issued a Decision and Order affirming Judge Kichuk's finding of pneumoconiosis and causal relationship, but remanding the claim for further consideration of the total disability finding under §§718.204(c)(3) & (4). DX 33, 34.

On March 5, 1992, Judge Kichuk issued a Decision and Order on Remand Awarding Benefits. DX 35. Judge Kichuk found that Mr. Shannon had established total disability due to pneumoconiosis. However, the Employer appealed this award of benefits and the Board issued a Decision and Order on May 25, 1994, vacating Judge Kichuck's decision and remanding for further consideration on the issue of total disability due to pneumoconiosis. DX 40.

On June 14, 1995, Judge Kichuk issued a Decision and Order on Second Remand Denying Benefits. Judge Kichuk found that the weight of the evidence did not establish the Mr. Shannon was totally disabled due to pneumoconiosis. DX 43.

On April 24, 1996, Mr. Shannon filed his first request for modification. DX 44. This request was denied by Administrative Law Judge Burke on April 6, 1998 because Mr. Shannon failed to establish total disability due to pneumoconiosis. DX 65.

On January 4, 1999, Mr. Shannon filed his second request for modification. DX 67. Administrative Law Judge Malamphy denied this request in a Decision and Order dated January 6, 2000. DX 82. Judge Malamphy determined that Mr. Shannon had not established that he was totally disabled due to pneumoconiosis.

Mr. Shannon filed his third request for modification on December 12, 2000. DX 83. The District Director, OWCP, denied the claim on February 1, 2001. DX 86. Administrative Law Judge Levin found that Mr. Shannon was unable to establish total disability or a mistake in determination of fact. DX 99.

On May 17, 2002, Mr. Shannon appealed Judge Levin's Decision and Order. DX 101. After filing this appeal, on July 31, 2002, Mr. Shannon requested that his case be "remanded for modification." DX 107. In an Order dated September 9, 2002, the Board dismissed the appeal and remanded the case to the district director for consideration of the request for modification. DX 108. On June 25, 2003, the District Director issued a Proposed Decision and Order Denying Request for Modification. DX 120. On July 2, 2003, Mr. Shannon requested a formal hearing and this claim was referred to Office of Administrative Law Judges on November 12, 2003. DX 129.

ISSUES

The issues contested by the Employer and the Director are whether the Claimant is totally disabled; whether his disability is due to pneumoconiosis; and whether the evidence establishes a material change in conditions or a mistake in a determination of fact in a prior denial of his claim pursuant to 20 CFR § 725.310 (2000). The Employer also contests whether the Claimant has pneumoconiosis as defined by the Act and the regulations; whether his pneumoconiosis arose out of coal mine employment; whether the named Employer is the Responsible Operator; and whether the named Employer secured the payment of benefits. Those issues were determined in prior decisions and were not disturbed by the Benefits Review Board. In addition, the District Director listed as contested the issue whether the evidence establishes a material change in conditions pursuant to 20 CFR § 725.309 (2000). *See* DX 129. As this is a request for modification of denial of the Claimant's initial claim, and not a duplicate claim, Section 309 is not at issue.

APPLICABLE STANDARDS

This case pertains to a request for modification of an adverse decision of a claim filed on November 13, 1984. Because the claim at issue was filed after March 31, 1980, the regulations at 20 CFR Part 718 apply. 20 CFR § 718.2 (2005). Parts 718 (standards for award of benefits) and 725 (procedures) of the regulations underwent extensive revisions effective January 19, 2001. 65 Fed. Reg. 79920 et seq. (2000). The Department of Labor has taken the position that as a general rule, the revisions to Part 718 should apply to pending cases because they do not announce new rules, but rather clarify or codify existing policy. See 65 Fed. Reg. at 79949-79950, 79955-79956 (2000). Changes in the standards for administration of clinical tests and examinations, however, would not apply to medical evidence developed before January 19, 2001. 20 CFR § 718.101(b) (2000). The new rules specifically provide that some revisions to Part 725 apply to pending cases, while others (including revisions to the rules regarding duplicate claims and modification) do not; for a list of the revised sections which do **not** apply to pending cases, see 20 CFR § 725.2(c) (2005). The U.S. District Court for the District of Columbia upheld the validity of the new regulations in *National Mining Association v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). However, the Court of Appeals affirmed in part, reversed in part, and remanded the case. *National Mining Association v. Department of Labor*, 292 F.3d 849 (D.C. Cir. 2002) (Upholding most of the revised rules, finding some could be applied to pending cases, while others should be applied only prospectively, and holding that one rule empowering cost shifting from a claimant to an employer exceeded the authority of the Department of Labor).

On December 15, 2003, the Department of Labor promulgated revisions to 20 CFR §§ 718.2, 725.2 and 725.459 implementing the Circuit Court's opinion. 68 Fed. Reg. 69930 et seq. (2003). In this case, the Claimant filed his claim before the effective date of the new regulations. Accordingly, I will apply only the sections of the newly revised version of Parts 718 and 725 that the court did not find impermissibly retroactive. In this Decision and Order, the "old" rules applicable to this case will be cited to the 2000 edition of the Code of Federal Regulations; the "new" rules will be cited to the 2005 edition.

Pursuant to 20 CFR § 725.310 (2000), in order to establish that he is entitled to benefits, the Claimant must demonstrate that there has been a material change in conditions or a mistake in determination of fact such that he meets the requirements for entitlement to benefits under 20 CFR Part 718. In order to establish entitlement to benefits under Part 718, the Claimant must establish that he suffers from pneumoconiosis, that his pneumoconiosis arose out of his coal mine employment, and that his pneumoconiosis is totally disabling. 20 CFR §§ 718.1, 718.202, 718.203 and 718.204 (2005). Where modification is sought based on an alleged change in conditions, new evidence must be submitted and the administrative law judge must conduct an independent assessment of the newly submitted evidence, in conjunction with the evidence previously submitted, to determine whether the weight of the evidence is sufficient to establish the element or elements which defeated entitlement in the prior decision. *Napier v. Director, OWCP*, 17 BLR 1-111, 1-113 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156, 1-158 (1990), *modified on recon.*, 16 BLR 1-71 (1992). Where modification is sought based upon a mistake of fact, new evidence is not a prerequisite, and the adjudicator may resolve the issue based upon "wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *Kovac v. BCNR Mining Shipyards, Inc.*, 16 BLR 1-71, 1-73 (1992), *modifying* 14 BLR 1-156 (1990).

As will be discussed in detail below, the medical evidence does not establish that the Claimant has any pulmonary or respiratory impairment which is totally disabling. Upon reviewing the evidence submitted before Judge Kichuk, Judge Burke, Judge Malamphy, and Judge Levin, I find no mistake in a determination of fact in their decisions which affected the outcome. Nor do I find that the new evidence establishes that a material change in conditions has occurred. For these reasons, the claim must be denied.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background and the Claimant's Testimony

Mr. Shannon testified at two hearings held on November 7, 2001, DX 98, and May 10,1988, DX 31, in Abingdon, Virginia. He testified that he worked in the coal mines for 15 years and started there when he was 17 years old. He testified that he has never smoked. His last coal mine employment was in Virginia. DX 2. Therefore this claim is governed by the law of the Fourth Circuit. *Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1989) (en banc).

Medical Evidence

All of the evidence which was previously admitted into the record and discussed in the prior decisions of Judges Kichuk, Burke, Malamphy and Levin is incorporated by reference. *See* DX 32, 35, 43, 65, 82, 99. Both parties submitted additional x-ray evidence, relating to the issue of whether the Claimant has coal workers' pneumoconiosis. *See* CX 1 and EX 1 and 2. As the request for modification can be resolved by reference only to the evidence relating to total disability due to a pulmonary or respiratory disability, however, I will recite only the evidence relating to that issue. Nonetheless, my decision here is based upon my review of the entire record.

Pulmonary Function Studies

Pulmonary function studies are tests performed to measure obstruction in the airways of the lungs and the degree of impairment of pulmonary function. The greater the resistance to the flow of air, the more severe the lung impairment. The studies range from simple tests of ventilation to very sophisticated examinations requiring complicated equipment. The most frequently performed tests measure forced vital capacity (FVC), forced expiratory volume in one-second (FEV_1) and maximum voluntary ventilation (MVV).

The following chart summarizes the results of the pulmonary function studies available in connection with the claim. "Pre" and "post" refer to administration of bronchodilators. If only one figure appears, bronchodilators were not administered. In a "qualifying" pulmonary study, the FEV_1 must be equal to or less than the applicable values set forth in the tables in Appendix B of Part 718, and either the FVC or MVV must be equal to or less than the applicable table value, or the FEV_1/FVC ratio must be 55% or less. 20 CFR § 718.204(b)(2)(i) (2005).

Ex. No. Date Physician	Age Height[1]	FEV_1 Pre-/ Post	FVC Pre-/ Post	FEV_1/ FVC Pre-/ Post	MVV Pre-/ Post	Qualify?	Physician Impression
DX 8 12/11/84 Baxter	52 70"	1.45[2]	1.90		80	Yes	Test not acceptable per Dr. Zaldivar, DX 8, and Dr. Hippensteel, DX 55

[1] The fact-finder must resolve conflicting heights of the miner recorded on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221, 1-223 (1983); *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 114, 116 (4th Cir. 1995). As there is a variance in the recorded height of the miner from 67" to 70", I have taken the mid-point (68.5") in determining whether the studies qualify to show disability under the regulations. None of the valid tests are qualifying to show disability whether considering the mid-point, or the heights listed by the persons who administered the testing.

Ex. No. Date Physician	Age Height[1]	FEV_1 Pre-/ Post	FVC Pre-/ Post	FEV_1/ FVC Pre-/ Post	MVV Pre-/ Post	Qualify?	Physician Impression
DX 9 05/03/85 Baxter	53 70"	2.94	3.62		119	No	No tracings or peak flow indicated. Per Dr. Hippensteel, DX 55, normal FEV_1, MVV,mildly reduced FVC.
DX 27, DX 114 11/14/85 Sargent	53 70"	2.70	3.33	81%	113	No	Suggest mild restrictive impairment but test results suspect, not reproducible; less than optimal effort. Per Dr. Hippensteel, DX 55, suboptimal effort.
DX 50 11/21/95 Robinette	63 70"	3.31	4.59	72%		No	Normal
DX 54 08/27/96 Hippensteel	64 67"	3.24 3.37	4.13 4.16	78% 81%	122 113	No No	Normal spirometry pre and post bronchodilator. Normal MVV. No restriction, some air trapping.
DX 59, DX 55 11/20/96 Iosif	64 70"	2.98 2.83	3.91 3.62	76% 78%	103	No No	Normal

[2] These figures represent the lowest tested values, which Dr. Baxter relied upon in reaching his conclusion that Mr. Shannon was disabled. He should have relied upon the highest values obtained during the testing. In any event, based on Drs. Zaldivar's and Hippensteel's opinions, I find that all of the results were invalid.

Ex. No. Date Physician	Age Height[1]	FEV_1 Pre-/ Post	FVC Pre-/ Post	FEV_1/ FVC Pre-/ Post	MVV Pre-/ Post	Qualify?	Physician Impression
DX 72 07/01/98 Doubnik	66 70”	2.80 2.87	3.67 3.64	79% 79%	92	No No	Minimal obstructive defect. Mild restrictive defect. Per Dr. Hippensteel, DX 112, DX 85, normal with some variability of effort.
DX 77 03/23/99 Hippensteel	67 67”	3.33 3.48	4.08 4.37	82% 80%	102 113	No No	Normal spirometry pre and post bronchodilator. Normal MVV. No restriction. Some air trapping. Normal diffusion.
DX 113, DX 97, DX 95 05/09/01 Illegible signature	69 70”	1.61	3.86	41.70		Yes	Per Dr. Michos, DX 119, test was unacceptable due to less than optimal effort, cooperation and comprehension.
DX 94 06/11/01 Hippensteel	69 67”	2.72 2.96	3.43 3.70	79 80	85	No No	Normal pre and post bronchodilators. MVV is mildly reduced with markedly variable tidal volumes. Lung volumes normal. Diffusion is normal.

Ex. No. Date Physician	Age Height[1]	FEV_1 Pre-/ Post	FVC Pre-/ Post	FEV_1/ FVC Pre-/ Post	MVV Pre-/ Post	Qualify?	Physician Impression
DX 123 04/21/03 Hippensteel	71 68”	3.00 3.04	3.96 3.91	76 78	88	No No	Normal pre and post bronchodilators. MVV is mildly decreased with quite variable tidal volumes. Lung volumes suggest mild air trapping. Diffusion is normal.

Arterial Blood Gas Studies

Blood gas studies are performed to measure the ability of the lungs to oxygenate blood. A defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. The blood sample is analyzed for the percentage of oxygen (PO_2) and the percentage of carbon dioxide (PCO_2) in the blood. A lower level of oxygen (O_2) compared to carbon dioxide (CO_2) in the blood indicates a deficiency in the transfer of gases through the alveoli which may leave the miner disabled.

The following chart summarizes the arterial blood gas studies available in connection with the claim. A “qualifying” arterial gas study yields values which are equal to or less than the applicable values set forth in the tables in Appendix C of Part 718. If the results of a blood gas test at rest do not satisfy Appendix C, then an exercise blood gas test can be offered. Tests with only one figure represent studies at rest only. Exercise studies are not required if medically contraindicated. 20 CFR § 718.105(b) (2000).

Exhibit Number	Date	Physician	PCO_2 at rest/ exercise	PO_2 at rest/ exercise	Qualify?	Physician Impression
DX 11	12/11/84	Baxter	38.6	87.0	No	
DX 27, DX 114	11/14/85	Sargent	37.2	74.4	No	Mild hypoxemia
DX 25, DX 26	12/10/87	Doupnik	26.3	78.3	No	
DX 25, DX 26	12/12/87	Doupnik	31.8	72.2	No	

Exhibit Number	Date	Physician	PCO_2 at rest/ exercise	PO_2 at rest/ exercise	Qualify?	Physician Impression
DX 66	07/06/89 11:59 13:30	Doupnik	 34 36	 44 76	 Yes No	 Reduced per Dr. Hippensteel Normal per Dr. Hippensteel [Both taken at rest in intensive care unit during acute illness.]
DX 70	11/21/91	Doupnik	41	51.7	Yes	
DX 66, DX 70	07/16/92	Doupnik	35.3	55.2	Yes	
DX 66, DX 70	11/11/92	Doupnik	42.4	54.9	Yes	
DX 66, DX 70	05/17/93	Doupnik	36	55	Yes	
DX 66, DX 70, DX 85 CX 1	05/16/94	Doupnik	37	55	Yes	
DX 50	11/21/95	Robinette	36.2	82	No	Normal
DX 44	01/11-18/96	Doupnik	36.1 33.2	70.5 66.1	No No	[Both taken at rest during hospitalization for atelectasis]
DX 54	08/27/96	Hippensteel	36.5 33.7	79.0 92.4	No No	Normal resting and with exercise. Normal carboxyhemoglobin.
DX 56	11/19-23/96	Doupnik	29.7 38.9	80.1 61.3	No No	[Both taken at rest during hospitalization for tachypnea]
DX 72	04/23/98	Doupnik	27.2	76.6	No	[Taken during hospitalization for hyperventilation].
DX 72	04/24/98	Doupnik	37.6	67.6	No	[Taken during hospitalization for hyperventilation]
DX 72	07/01/98	Doubnik	35.8	78.2	No	

Exhibit Number	Date	Physician	PCO_2 at rest/ exercise	PO_2 at rest/ exercise	Qualify?	Physician Impression
DX 77	03/23/99	Hippensteel	37.2	68.9	No	Mild hypoxemia. Normal carboxyhemoglobin.
DX 113	07/02/99	Hippensteel	37.2	68.9	No	
DX 94	06/11/01	Hippensteel	35.9	71	No	Normal gas exchange for his age and barometric pressure. Carboxyhemoglobin level is normal.
DX 123, CX 1	06/19/02	Nikfar	33.8	79.9	No	
DX 123	04/21/03	Hippensteel	35.9 36.8	76.9 72.5	No No	Normal gas exchange at rest and with exercise

Medical Opinions

Medical opinions are relevant to the issues of whether the miner has pneumoconiosis, whether the miner is totally disabled, and whether pneumoconiosis caused the miner's disability. The medical opinions must be reasoned and supported by objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. 20 CFR § 718.202(a)(4) (2005). Where total disability cannot be established by pulmonary function tests, arterial blood gas studies, or cor pulmonale with right-sided heart failure, or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may be nevertheless found, if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents the miner from engaging in employment, i.e., performing his usual coal mine work or comparable and gainful work. 20 CFR § 718.204(b)(2)(iv) (2005). With certain specified exceptions not applicable here, the cause or causes of total disability must be established by means of a physician's documented and reasoned report. 20 CFR § 718.204(c)(2) (2005). The record contains the following medical opinions.

Dr. Baxter

Dr. Baxter examined Mr. Shannon on behalf of the Department of Labor on December 26, 1984. DX 10. Dr. Baxter's qualifications are not in the record. He took occupational, social, family and medical histories, and conducted a physical examination, chest x-ray, electrocardiogram, blood gas studies and pulmonary function testing. He reported that Mr. Shannon worked in the mines for 15 years, and never smoked. Based on qualifying pulmonary function test results, Dr. Baxter diagnosed COPD [chronic obstructive pulmonary disease] and CWP [coal workers' pneumoconiosis], and indicated that Mr. Shannon had a disabling

impairment due to coal dust exposure. However, the record indicates that Dr. Baxter erroneously relied on the worst, rather than the best, of the test trials in reaching his conclusion. Moreover, after the pulmonary function tests were judged unacceptable by Dr. Zaldivar, DX 8, they were re-administered on May 3, 1985, and resulted in non-qualifying values.

Dr. Sargent

Dr. Sargent examined Mr. Shannon on November 14, 1985, at the request of the Employer. DX 114, DX 112, DX 27, DX 25. Dr. Sargent is a B reader. He took occupational, social, family and medical histories, and conducted a physical examination, chest x-ray, blood gas studies and pulmonary function testing. He reported that Mr. Shannon worked in the mines for 15 years. He reported Mr. Shannon is not a smoker. The chest examination was normal. Dr. Sargent read the x-ray as showing pneumoconiosis. The pulmonary function test was suspect because the results were not reproducible and Mr. Shannon showed less than optimal effort. However, Dr. Sargent found that the best pulmonary function trial showed mild restrictive ventilatory impairment without any obstruction. The arterial blood gas study revealed mild hypoxemia. Dr. Sargent diagnosed coal workers' pneumoconiosis (based on occupational exposure and chest x-ray). Dr. Sargent concluded that Mr. Shannon should only be permitted to do light or sedentary labor.

Dr. Sargent was deposed on March 29, 1988. DX 29. He reiterated the findings in his report, and reviewed records from Dr. Baxter, Dr. Schmidt and Dr. Doupnik. Upon further consideration, Dr. Sargent said he doubted that Mr. Shannon would be disabled from his last coal mine job by the degree of impairment reflected in all of the arterial blood gas studies and pulmonary function studies he reviewed.

Dr. Schmidt

Dr. Schmidt examined Mr. Shannon at the request of his counsel on November 14, 1985. DX 114, DX 112. Dr. Schmidt is a B reader. He took occupational, social, family and medical histories, and conducted a physical examination and chest x-ray. He reported that Mr. Shannon worked in the mines for 15 years. He reported that Mr. Shannon does not smoke. The chest examination was normal. Dr. Schmidt read the x-ray as being "suggestive of coal workers' pneumoconiosis," but classified it as 0/1.

Dr. Garzon

Dr. Garzon reviewed Mr. Shannon's medical records on behalf of the Employer. DX 28. He was deposed on March 31, 1988. DX 29. Dr. Garzon specializes in internal medicine. Based on x-ray interpretations he reviewed, he concluded Mr. Shannon was in early first stage coal workers' pneumoconiosis. He said pulmonary function tests demonstrated a very mild restrictive defect if cooperation was adequate, but did not show disability. Arterial blood gases did not show disability either. Moreover, the results of the blood gas studies led him to question Dr. Doupnik's statement, described below, that Mr. Shannon was constantly hypoxemic. Rather, he believed that Mr. Shannon was hypoxic only when he had an acute illness. He found no objective medical findings suggestive of respiratory impairment. He concluded that there was no

evidence that Mr. Shannon had lost the functional capacity to return to coal mine work from a respiratory standpoint.

Dr. Doupnik

Dr. Doupnik treated Mr. Shannon between 1980 and 1998. The record contains an examination report from December 10, 1987. DX 25. Mr. Shannon was complaining that his heart was fluttering. Chest exam showed barrel position, with scar from surgery for hiatal hernia. Lungs had poor air entry with poor compliance due to emphysematous changes, but no rales, rhonchi, or wheezing. Dr. Doupnik's impression included chronic obstructive pulmonary disease, emphysematous changes, and mild hypoxemia, among others. On January 7, 1988, he prepared a letter stating that Mr. Shannon suffers from chronic obstructive pulmonary disease with emphysematous changes. Dr. Doupnik opined that Mr. Shannon suffers from severe hypoxemia. DX 26, DX 100. Dr. Doupnik certified that home oxygen therapy was medically necessary in August 1988, September 1989, November 1990, March 1992, November 1992, May 1993, July 1994, May 1995 and May 1996. DX 70, DX 113, DX 127.

Dr. Doupnik was deposed on March 24, 1988. DX 30, CX 1.[3] He testified that he practiced in family practice and pediatrics. He had no special expertise in pulmonology. He said Mr. Shannon had obstructive and restrictive lung disease, as well as heart problems, which he believed were caused by the lungs. He also said he had found evidence of cor pulmonale. Dr. Doupnik said that that Mr. Shannon was totally disabled based upon "severe dyspnea, ischemic heart disease, sick sinus syndrome, hypotension, arteriosclerosis, [and] seizures lately." He went on to say that Mr. Shannon is disabled from pulmonary causes alone because he is dyspneic, cyanotic, and fighting all the time for breath. Deposition at 12-13.

Mr. Shannon underwent a bronchoscopy in 1992. The postoperative diagnoses were hemoptysis, recurrent atelectasis of lower lobes and chronic bronchitis. DX 67.

Mr. Shannon was hospitalized from January 11-18, 1996, for shortness of breath due to atelectasis in both lungs. Dr. Doupnik's other pulmonary diagnoses included tachypnea, acute tracheobronchitis, chronic obstructive pulmonary disease with coal workers' pneumoconiosis, respiratory alkalosis, mild hypoxemia, and mild cyanosis DX 44.

Mr. Shannon was hospitalized from November 19-23, 1996, because of tachypnea. Dr. Doupnik attributed the tachypnea to mild chronic respiratory failure due to atelectasis, emphysematous changes and respiratory infection (sinusitis had been diagnosed on November 12), aggravated by chronic anxiety neurosis, hypoglycemic attacks resulting in cardiac arrhythmias, and petit mal-like seizures. DX 56.

Mr. Shannon was hospitalized from April 23-26, 1998, due to severe shortness of breath, passing out, and coughing blood. During his stay in the hospital, Dr. Doupnik consulted with Dr. Iosif, a pulmonologist. In the discharge report, Dr. Doupnik diagnosed severe hyperventilation with respiratory alkalosis due to panicky attack, possible manic psychosis. Other pulmonary

[3] Mr. Shannon submitted a select few pages from the deposition as part of CX 1.

diagnoses included chronic atelectasis in the right lower lobe and mild hypoxemia. Dr. Doupnik mentioned that one of Mr. Shannon's problems was that he was fighting to get his black lung benefits, have been awarded twice, but having them taken away both times.

Dr. Patel

Dr. Patel saw Mr. Shannon three times in 1995 for lab work and an x-ray, and once in July 1997, when Mr. Shannon complained of his chest hurting and smothering. At that time, Dr. Patel assessed COPD and old atelectasis. Dr. Patel began treating Mr. Shannon more often in 1998, after Dr. Doupnik retired. During a physical examination in July 1998, Dr. Patel observed prolonged expiration, diminished breath sounds, and expiratory rhonchi at the lung bases. He diagnosed an exacerbation of COPD and coal workers' pneumoconiosis. In November 1998, Dr. Patel observed normal oxygen at rest, but said supplemental oxygen would relieve Mr. Shannon's symptoms of difficulty breathing at night and after exertion. DX 71. A February 1999 report from Home Care Equipment, Inc. reflected that Mr. Shannon had been on supplemental oxygen for 16 hours per day since 1987. DX 70.

Dr. Nikfar

Mr. Shannon began treatment with Dr. Nikfar at a Primary Care Clinic on March 7, 2001. CX1. Dr. Nikfar took Mr. Shannon's medical, social and occupational history and conducted a physical examination. He reported that Mr. Shannon worked in the mines for 15 years. He reported that Mr. Shannon did not smoke. He further noted that Mr. Shannon was using home oxygen, and had a history of black lung and chronic obstructive pulmonary disease.

Dr. Nikfar saw Mr. Shannon again on June 22, 2001. CX 1. At this visit, Dr. Nikfar diagnosed COPD and CWP. He conducted a physical examination, and the chest examination was normal.

Approximately one year later on June 19, 2002, Mr. Shannon was again seen by Dr. Nikfar. CX 1. Dr. Nikfar noted that Mr. Shannon has black lung. Dr. Nikfar conducted a physical examination, arterial blood gas study and reviewed a February 2002 chest x-ray. The chest examination was normal. The arterial blood gas study was normal. The results are recorded on the table above. Dr. Nikfar stated that the February 2002 x-ray showed small densities in right lung base.

Dr. Narayanan

On April 14, 2002, Dr. Narayanan prepared a report concerning Mr. Shannon. He stated:

> He has multiple medical problems which include COPD for which he uses oxygen at night. He has a history of occupational exposure to coal.
>
> He is disabled and incapable of gainful employment.

CX 1.

Dr. Narayanan examined Mr. Shannon on April 9, 2003. DX 128; DX 117. He took occupational, social, family and medical histories, and conducted a physical examination. He reported that Mr. Shannon worked in the mines for 15 years. He reported that Mr. Shannon has never smoked before in his life. The chest examination and spirometry were normal. The results of the pulmonary function testing are not included in the table above, because the numerical results and tracings are not in the record. Dr. Narayanan reviewed an x-ray taken November 25, 2002. He diagnosed coal workers' pneumoconiosis, chronic obstructive pulmonary disease, and chronic shortness of breath. Additionally, Dr. Narayanan opined that Mr. Shannon's "subjective shortness of breath can be traced to his occupational history of exposure to coal."

Dr. Hippensteel

Dr. Hippensteel examined Mr. Shannon on behalf of the Employer on August 27, 1996 (DX 55), March 23, 1999 (DX 77), September 21, 1999 (DX 85, DX 112), June 11, 2001 (DX 94, CX 1[4]) and April 23, 2003 (DX 123). Dr. Hippensteel is board-certified in internal medicine and pulmonary disease, and a B reader. On each occasion, he took occupational, social, family and medical histories, and conducted a physical examination, chest x-ray, blood gas studies and pulmonary function testing. Additionally, Dr. Hippensteel reviewed other medical data on Mr. Shannon. In his most recent report, he said that Mr. Shannon worked in the mines for 12 years. He reported that Mr. Shannon has never been a smoker. The chest examination was normal. Dr. Hippensteel read the x-ray as being negative for pneumoconiosis. The pulmonary function test was normal. The arterial blood gas study was normal. Unlike the previous examination, Mr. Shannon agreed to an exercise study. Based upon his examination, Dr. Hippensteel concluded that Mr. Shannon was not suffering from coal worker's pneumoconiosis. Dr. Hippensteel found that Mr. Shannon had no impairment in function based on his lungs, and that he retained the respiratory capacity to perform his last job in the mines. Furthermore, Dr. Hippensteel opined that even if pneumoconiosis were stipulated, Mr. Shannon suffers from no ventilatory or gas exchange impairment from it or any other cause. He observed that Dr. Doupnik did not support his conclusions with accurate data or expertise, resulting in inaccurate conclusions.

Dr. Hippensteel came to the same conclusions each time he examined Mr. Shannon. In a deposition taken on October 29, 2001, Dr. Hippensteel testified regarding his previous examinations of Mr. Shannon. DX 96. Dr. Hippensteel testified that he had (at that time) examined Mr. Shannon three times. Dr. Hippensteel reiterated the opinion he gave at the time of his examinations. Dr. Hippensteel was also deposed in 1997. DX 59. He testified that Mr. Shannon's atelectasis was a complication of surgery to repair his hiatal hernia in 1992. Deposition at 11.[5] In his depositions, as in his reports, he disagreed with Dr. Doupnik's conclusions about the condition of Mr. Shannon's lungs in almost every respect.

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[4]Mr. Shannon submitted only a portion of Dr. Hippensteel's report of the June 11, 2001 examination as part of his exhibit, CX 1.

[5] *See also* an operative note from removal of a skin lesion dated October 6, 1998, physician unidentified, observing that one reason for Mr. Shannon's atelectasis was thought to be a previous hiatal hernia repair. DX 66.

Total Pulmonary or Respiratory Disability

A miner is considered totally disabled if he has complicated pneumoconiosis, 30 U.S.C. § 921(c)(3), 20 CFR § 718.304 (2005), or if he has a pulmonary or respiratory impairment to which pneumoconiosis is a substantially contributing cause, and which prevents him from doing his usual coal mine employment and comparable gainful employment, 30 U.S.C. § 902(f), 20 CFR § 718.204(b) and (c) (2005). None of the x-ray readers found opacities greater in size than 1/2, and there were no CT scans or biopsies. Thus there is no evidence in the record that Mr. Shannon suffers from complicated pneumoconiosis. The regulations provide five methods to show total disability other than by the presence of complicated pneumoconiosis: (1) pulmonary function studies; (2) blood gas studies; (3) evidence of cor pulmonale with right-sided congestive heart failure; (4) reasoned medical opinion; and (5) lay testimony. 20 CFR § 718.204(b) and (d) (2005). Lay testimony may only be used in establishing total disability in cases involving deceased miners, and in a living miner's claim, a finding of total disability due to pneumoconiosis cannot be made solely on the miner's statements or testimony. 20 CFR § 718.204(d) (2005); *Tedesco v. Director, OWCP*, 18 B.L.R. 1-103, 1-106 (1994). In the absence of contrary probative evidence, evidence from any of these categories may establish disability. If there is contrary evidence, however, I must weigh all the evidence in reaching a determination whether disability has been established. 20 CFR § 718.204(b)(2) (2005); *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-198 (1986).

In this case, there are now results from eleven pulmonary function studies performed between 1984 and 2003 in the record. Only two resulted in values qualifying to establish disability, the tests administered in December 1984, and May 2001. Dr. Zaldivar and Dr. Hippensteel said the 1984 test was not acceptable under the regulations; Dr. Michos said the 2001 test was not acceptable. I find that neither of the two qualifying tests were valid, and, in any event, nine of the eleven pulmonary function tests did not produce qualifying results. As a result, I cannot find total disability based upon the pulmonary function studies.

Moving on to the arterial blood gas studies, the record contains results of 27 studies, including 2 exercise studies, taken between 1984 and 2003. Only 5 studies, all taken between 1991 and 1994, produced values qualifying for disability. None of the studies taken from 1995 on did so. The two exercise studies, taken by Dr. Hippensteel in 1996 and 2003, were both normal. As a result, Mr. Shannon has not demonstrated total disability through the arterial blood gas studies.

I must next consider the medical opinions. Dr. Baxter did not actually state that Mr. Shannon was disabled; he merely compared the results of an invalid pulmonary function test to the standards in the regulations. I give his opinion no weight, as it was based on invalid tests. Dr. Schmidt, Dr. Patel and Dr. Nikfar did not give any opinion regarding disability. Although Dr. Narayanan said Mr. Shannon was disabled in 2002, his opinion is ambiguous, because it is unclear whether the disability he assessed was based on the diagnosis of COPD alone, or on a combination of Mr. Shannon's "multiple" medical problems. Dr. Narayanan did not give an opinion as to disability after his 2003 examination, during which pulmonary function testing resulted in normal values. Accordingly, I give his opinion little weight. Although Dr. Sargent

initially stated in 1985 that Mr. Shannon would be restricted to light or sedentary labor, when he reviewed the results of pulmonary function and arterial blood gas studies for his 1988 deposition, he said he doubted that Mr. Shannon would be disabled from his last coal mine job. Hence the only definitive opinions in the record regarding disability are those of Dr. Doupnik, who believed Mr. Shannon to be disabled, as opposed to Drs. Garzon and Hippensteel, who believed the opposite.

Despite his status as Mr. Shannon's treating physician, I can find little reason to credit Dr. Doupnik's opinion over that of Dr. Hippensteel. Dr. Doupnik had no special qualifications, while Dr. Hippensteel is a well-qualified pulmonologist. Moreover, the objective evidence, in the form of pulmonary function tests and arterial blood gas studies, overwhelmingly supports the view that Mr. Shannon is not disabled. I also note that when Mr. Shannon was hospitalized in 1998, Dr. Doupnik consulted with a pulmonologist, Dr. Iosif. There is no evidence from the hospitalization records that Dr. Iosif supported Dr. Doupnik's assessment that Mr. Shannon's breathing difficulties resulted from coal dust-related disease. Rather, the first-listed diagnosis from that hospitalization was severe hyperventilation due to a panic attack. Although Dr. Doupnik said that he thought a Gated Blood Pool Study "suggested for mild Cor Pulmonale," DX 56, Dr. Hippensteel offered a through and well-reasoned explanation at his first deposition, based on those and other test results, that Mr. Shannon had no decrease in lung function, and normal right ventricular function, DX 59. Thus he did not meet the standard in the regulations found at 20 CFR §718.204(b)(2)(iii) (2005) for cor pulmonale with right-sided congestive heart failure. Dr. Hippensteel examined Mr. Shannon five times between 1996 and 2003, and reviewed his records on multiple occasions as well. He has a broad base of observation and objective data upon which to reach an opinion. His opinion that Mr. Shannon is not disabled by a pulmonary or respiratory impairment is consistent with the objective testing. I conclude that Dr. Hippensteel's well-documented and well-reasoned opinions are entitled to greater weight than Dr. Doupnik's opinions. Dr. Garzon's opinion, although based on much more limited information, is also consistent with the objective testing, and adds support to Dr. Hippensteel's opinions.

I conclude that the Claimant has failed to show that he is totally disabled by a pulmonary or respiratory impairment.

FINDINGS AND CONCLUSIONS REGARDING ENTITLEMENT TO BENEFITS

The Claimant has failed to meet his burden to show that he is totally disabled by a pulmonary or respiratory impairment. He has also failed to establish that there has been a material change in conditions or a mistake in a determination of fact in a prior denial of his claim. Thus he is not entitled to benefits under the Act.

ORDER

The request for modification filed by Elmer Lee Shannon on July 31, 2002, is hereby DENIED.

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ALICE M. CRAFT
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).